

OFFICE OF GENERAL COUNSEL

M E M O R A N D U M

TO: Chief, PIRS

FROM: Associate General Counsel, Litigation Division

SUBJECT: Daniel Becker v. FCC & USA, No. 95-1048 and Washington Area Citizens Coalition Interested in Viewer's Constitutional Rights v. FCC & USA, No. 95-1058. Filing of two new Petitions for Review filed in the United States Court of Appeals for the District of Columbia Circuit.

DATE: January 24, 1995

Docket No(s). MM 92-254

File No (s).

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This is to advise you that Daniel Becker, on January 19, 1995, and Washington Area Citizens Coalition Interested in Viewer's Constitutional Rights, on January 23, 1995, filed Section 402(a) Petitions for Review of: In the Matter of Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, FCC 94-249, released November 22, 1994.

Petitioners challenge the MO&O that held that broadcast licensees may decline to broadcast commercials for legally qualified candidates for federal office at times specified by the candidates where the broadcaster determines that the commercials, while not indecent, may otherwise be harmful to children.

Due to a change in the Communications Act, it will not be necessary to notify the parties of this filing.

The Court has docketed these cases as Nos. 95-1048 and 95-1058 and this case has not yet been assigned.

Daniel M. Armstrong

cc: General Counsel
Office of Public Affairs
Shepard's Citations

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DANIEL BECKER

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION

Respondent

No. 95-1048
Filed: 1/19/95

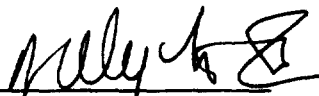
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PETITION FOR REVIEW

Daniel Becker (Becker), pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 402(a), hereby petitions the Court for review of the Memorandum Opinion and Order, FCC 94-249 (released November 22, 1994)(MO&O). See Exhibit 1. The MO&O denied certain relief requested by Becker concerning the broadcast of certain political speech. The Federal Communications Commission (FCC) also adopted a policy limiting political speech containing abortion imagery on broadcast outlets and further permitting broadcasters to channel such speech to certain times of the day. Becker filed both an Application for Review, which was the subject of the FCC's MO&O, as well as comments on the issues in response to a request by the FCC for such comments from the public. Becker seeks relief on the grounds that the FCC's MO&O is arbitrary and capricious and is unconstitutional.

Respectfully submitted,

DANIEL BECKER

By 
A. Wray Fitch III
His Attorney

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January 19, 1995

[K:\0067\APPEAL\AWF]

In the
**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Washington Area Citizens Coalition
Interested in Viewer's Constitutional Rights,

Petitioner,

v.

Federal Communications Commission and
United States of America,

Respondents.

OFFICE OF
GENERAL COUNSEL

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No. 95-1058

Filed: 1/23/95

PETITION FOR REVIEW

Pursuant to 47 U.S.C. Section 402(a), 28 U.S.C. Section 2342(1) and 28 U.S.C. Section 2344, the Washington Area Citizens Coalition Interested in Viewers Constitutional Rights ("Petitioner" or "WACCI-VCR") hereby petitions this court for review of the Federal Communications Commission's ("FCC" or "Commission") *Memorandum Opinion and Order* ("MO&O"), FCC No. 94-249 (released November 22, 1994) in MM Docket No. 92-254.

Venue in this court is proper under 28 U.S.C. Section 2343. This petition is timely filed under 28 U.S.C. Section 2344.

A copy of the Commission's *MO&O* is provided and attached to this Petition.

Petitioner

Petitioner WACCI-VCR is a non-profit membership organization. Its members are listeners and viewers of the electronic media. The organization seeks to represent its members' interests in protecting their right to be informed on issues of importance, and to hear the views of all legally qualified candidates for public office. Members of WACCI-VCR have been legally qualified candidates for public office in the past, and may in the future run for political office.

The Commission's *MO&O*

Petitioner seeks review of that portion of the Commission's *MO&O*, FCC No. 94-249 (released November 22, 1994) which holds that broadcast licensees may decline to broadcast commercials for legally qualified candidates for federal office at times specified by the candidates where the broadcaster determines that the commercials, while not indecent, "may otherwise be harmful to children." *MO&O* at ¶¶13, *et seq.* The Commission found such "channeling" of political advertisements to later hours to be consistent with the licensee's duty under 47 U.S.C. Section 312(a)(7) to provide reasonable access to federal candidates for public office. *MO&O* at ¶¶13-23. The Commission also found that permitting broadcasters to exercise discretion in this manner did not transgress the prohibition against censorship of political advertisements found in 47 U.S.C. Section 315(a). *MO&O* at ¶24.

The Commission's *MO&O* granted an application for review filed by Kaye, Scholer, Fierman, Hays & Handler ("Kaye Scholer") which sought reversal of the FCC Mass Media Bureau's decision to deny Kaye Scholer's July 29, 1992 petition for declaratory ruling. The petition sought a declaratory ruling that a

broadcaster may, consistent with the reasonable access provision of Section 312(a)(7) of the Communications Act and the "no censorship" provision of Section 315(a) of the Communications Act, "channel" into those hours when there is no reasonable risk of children being in the audience, candidate "uses" that present graphic depictions of dead or aborted and bloodied fetuses or fetal tissue.

MO&O at ¶1 n.2. The *MO&O* also denied the December 3, 1992 application for review of Daniel Becker, a candidate for federal office in Georgia. Mr. Becker sought review of an October 30, 1992 Mass Media Bureau decision which declined to rule on whether a political advertisement

placed by Mr. Becker on WAGA-TV, Atlanta, Georgia, was indecent under 18 U.S.C. §1464.¹

In its *MO&O*, the Commission ruled that these political advertisements, which portrayed abortions and fetal tissue, did not depict or describe sexual or excretory activities or organs and therefore did not meet the Commission's definition of indecency or the definition of 18 U.S.C. §1464. *MO&O* at ¶¶10-12.² The Commission went on to rule that for material which the broadcast licensee, using its "reasonable, good faith judgment," feels is harmful to children, it may, consistent with its "reasonable access" and "non-censorship" duties, "channel" these advertisements so they will not be shown at times when there is a high likelihood that children will be in the audience. *MO&O* at ¶13.

Petitioner respectfully seeks review of the *MO&O*. To the extent indicated, this action is arbitrary and capricious and in excess of statutory authority in that it contradicts the plain language and legislative history of Sections 312 and 315 of the Communications Act. In addition, the Commission's action violates the First Amendment of the United States Constitution.

WHEREFORE, Petitioner respectfully requests that this Court:

1. Reverse that part of the Commission's *MO&O* which holds that broadcast licensees may, consistent with Sections 312(a)(7) and 315 of the Communications Act, channel political advertisements which they in good faith believe may be harmful to child viewers to hours when these children are less likely to be in the viewing audience;
2. Remand this matter to the Commission with instructions to issue a revised decision

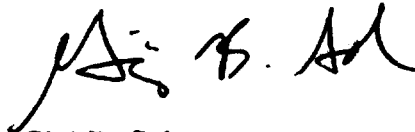
¹The Commission sought public comment on the various issues raised in the applications for review. See *Request for Comments*, 7 FCC Rod 7297 (1992). WACCI-VCR filed comments and reply comments pursuant to the Commission's request.

²Petitioner does not seek review of this portion of the Commission's *MO&O*.

stating that such channeling is contrary to the "reasonable access" requirement of Section 312(a)(7) and the "no censorship" provision of Section 315; and

3. Grant all such other relief which may be just and proper.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Gigi B. Sohn". The signature is stylized with a large, sweeping initial "G" and a distinct "S" at the end.

Gigi B. Sohn
Joseph S. Paykel
Andrew Jay Schwartzman
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Counsel for Petitioner

January 23, 1995